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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/762,098

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Linda Kalustian Lester

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EXAMINER

PRATT, HELEN F

ART UNIT

PAPER NUMBER

1761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
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3 MONTHS

12/19/2006

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

## Office Action Summary

**Application No.**

10/762,098

**Applicant(s)**

LESTER ET AL.

**Examiner**

Helen F. Pratt

**Art Unit**

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-26 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-26 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_.
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_.
- ☐ Notice of Informal Patent Application
- ☐ Other: \_\_\_\_.

**DETAILED ACTION**

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1 and 24 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 1 is indefinite in the use of the term “flakes”. It is not known what type of flakes applicant requires.

Claim 24 is indefinite in the use of the phrase “rolling out.... Into a coil”. It is not seen how rolling out a ball would make a coil. Rolling out a ball would make a flat piece of dough or at least a roll.

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claim 9 is rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for particular types of gluten-free premixes and broth, does not reasonably provide enablement for any and all types of gluten-free pre-mixes and broths. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make the invention commensurate in scope with these claims.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 1 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hunter (The Natural Foods Cookbook, page 35 and 34).

Hunter discloses a grain seed wafer containing millet, cracked wheat, sunflower seeds and potato water. The ingredients are blended and dropped onto a hot griddle (page 35). Claim 1 differs from the reference in the use of a gluten free pre-mix containing flakes and spices. The reference discloses the use of cracked wheat, which is known to contain gluten, however, other seeds could be used instead of cracked wheat. Hunter discloses under "Whole wheat wafers" that a number of seeds can be used to vary the flavor in a wafer (page 31, 2<sup>nd</sup> paragraph, under "variations"). It would have been within the skill of the ordinary worker to vary the type of seeds depending on their function, especially in this case the cracked wheat does not have any binding powder especially as it is well known that people with celiac disease cannot tolerate gluten which is in any wheat containing cereal. Also, Attention is invited to In re Levin, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative

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relationship between the selected ingredients which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. In this case all the ingredients are used for their known function and no coaction of ingredients is seen to make a new product.

Claim 1 further requires the use of oil. Oil and potato water (broth) are disclosed under "100% oatmeal crackers", on page 34 of Hunter. Other recipes using oil are disclosed on pages 34 and 35. Spices are disclosed under "Herbed whole wheat straws", page 34. The fact that the claim calls the mixture of seeds flakes and spices is not given weight because as in any recipe the ingredients have to be assembled. If one wants to package 3 of the ingredients and call it a premix, this is seen as being within the skill of the ordinary worker. In "Grain-seed wafers", millet, wheat and the sunflower seeds could be considered a premix as they are used together with liquid. Therefore, it would have been obvious to use oil in other snack type compositions and to call particular ingredients a premix.

Claims 2, 3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hunter as applied to claim 1 above, and further in view of Crook et al. (The Yeast Connection).

Claims 2 and 3 further require various gluten-free seeds and flakes along with amaranth, pepper and salt. Crook et al. disclose the use of quinoa, page 125, "cooked quinoa or Teff, amaranth and quinoa are disclosed on page 126, Nut'N Seed Crust discloses nuts and sesame seeds. The starch in the recipe is not considered to contain gluten (page 301). Nothing new is seen in the use of further edible seeds such as poppy, flax and sunflower. Also, page 126 discloses that it is known to mix various non-grains. The use of salt and pepper are of course

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well known to one of ordinary worker skill in the art. As above no coaction of ingredients or a cooperative relationship between the ingredients is seen to produce a new product (In re Levin, supra). Therefore, it would have been obvious to use known ingredients to make a premix.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 4, 6 are rejected under 35 U.S.C. 102b as being anticipated by Crook et al., page 185.

Crook et al. disclose the use of a broth as in claim 4 that contains fresh vegetables, oil, bay leaf and water (beef broth contains water). No patentable distinction is seen between the cited olive oil and organic oil at this time. No gluten is seen in the recipe.

Claims 4, 5, 7, 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Crook et al.

The limitations of claim 4 have been disclosed above and are obvious for those reasons. Claim 5 further requires safflower oil. Safflower is another polyunsaturated oil. No patentable distinction is seen between this oil and other polyunsaturated oils which are commonly used absent a showing of unexpected results. It is well known that polyunsaturated oils are better for one than saturated fats. Claim 7 further contains onions, celery, thyme. The other ingredients are well known ingredients for soup and nothing new is seen in their use nor in the use of a red

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onion (claim 8). Therefore, it would have been obvious to use known ingredients to make a broth (soup).

Claims 9-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hunter as applied to the claims above, and further in view of Crook et al.

Claim 9 further requires a gluten- free food containing the premix, oil and broth. Hunter as above discloses as in claim 1 the premix as being millet, wheat and sunflower seeds, the broth is potato water, oil was disclosed in the other recipes on pages 34 and 35. Therefore, it would have been obvious to make a food item from the above ingredients as shown by Hunter.

The limitations of claims 10 and 11 have been disclosed above and are obvious for those reasons.

Claims 11 –13 further require that the ingredients are organic. However, no patentable distinction is seen at this time between organic ingredients and other ingredients absent a showing of unexpected results using organic ingredients. It is well known that organic ingredients should not contain pesticides or other chemicals. It would have been within the skill of the ordinary worker to use organic ingredients if one felt that pesticides and chemicals were harmful to the health. Therefore, it would have been obvious to use known organic ingredients if one considered pesticides and chemicals harmful to the health.

Claim 14 requires a savory and claims 15 –23 particular savories. The broth or soup of Crook et al. disclose the use of salt, pepper, oregano, thyme (page 185). Nothing new is seen in adding cheese to a soup as in onion soup, which contains a layer of cheese at the top. Therefore, it would have been obvious to add various ingredients to the composition for their functions of being tasty and flavorful, and also to impart antioxidants, vitamins and minerals, and protein.

Claims 24-26 are to the method of making the food. Hunter discloses combining broth (potato water) and seeds, it is known to add oil as above and savories. Claim 24 differs from the reference in making the mixture into a ball and lightly dusting with amaranth powder to make a coil, cutting, and pressing the pieces. Hunter discloses making a batter and dropping onto a griddle to cook (Grain seed wafers, page 35). Amaranth powder is another flour-like material that does not contain gluten. Making a roll, shaping, slicing and baking are disclosed under cheese crackers of Hunter (page 35). Cooking till browned is a well known cooking process. Manual process or machine processes are well known in baking as in claims 25 and 26. Therefore, it would have been obvious to use the process found in "cheese crackers" in the process of "grain seed wafers" for its known function since wafers or crackers are made in either process.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should



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you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 12-12-06

*H. Pratt*  
HELEN PRATT  
PRIMARY EXAMINER  
12-13-06